

Jan 11, 2019

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SEAN F. McAVOY, CLERK

GB AUCTIONS INC., a Washington  
corporation,

Plaintiff,

v.

OLD REPUBLIC INSURANCE  
COMPANY, a Delaware corporation;  
and OLD REPUBLIC AEROSPACE  
INC., a Delaware corporation,

Defendants.

No. 2:18-cv-00237-SMJ

**ORDER DENYING  
DEFENDANTS' MOTION TO  
DISMISS AND GRANTING  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

Before the Court is Defendants Old Republic Insurance Company and Old Republic Aerospace Inc.'s Motion to Dismiss, ECF No. 8, and Plaintiff GB Auctions Inc.'s Motion for Partial Summary Judgment, ECF No. 11. These motions present one main issue: whether, under Washington state law, the parties' insurance contract contains an enforceable appraisal provision or an unenforceable binding arbitration provision. Defendants argue the provision at issue here requires appraisal, this requirement is enforceable, and the Court must dismiss the complaint because it fails to allege Plaintiff complied with this requirement. Plaintiff argues the provision at issue here requires binding arbitration, this requirement is unenforceable, and the

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JUDGMENT - 1

1 Court must grant partial summary judgment declaring this requirement void.

2 The Court held a hearing on these motions on January 8, 2019. ECF No. 21.  
3 In preparation for the hearing, the Court reviewed the record and relevant legal  
4 authority. At the conclusion of the hearing, the Court orally denied Defendants'  
5 motion and granted Plaintiff's motion. This Order memorializes and supplements  
6 the Court's oral ruling.

### 7 **BACKGROUND<sup>1</sup>**

8 In November 2017, the parties executed a contract for Defendants to insure  
9 Plaintiff's 1998 Beech King Aircraft Model 200. ECF No. 1 at 3. The contract  
10 provides that if the aircraft suffers physical damage not amounting to total loss,  
11 Plaintiff may have a third party repair it and Defendants will pay the net cost of  
12 repairing it with material and parts of similar kind and quality. *Id.*

13 On January 23, 2018, the aircraft suffered partial physical damage while  
14 landing. *Id.* Plaintiff submitted an insurance claim to Defendants the next day. *Id.*

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15 <sup>1</sup> In deciding Defendants' motion to dismiss, the only material facts are set forth in  
16 the complaint, ECF No. 1 at 3–9, and the contract, ECF No. 8-1 at 12. In deciding  
17 Plaintiff's motion for partial summary judgment, the only material facts are set forth  
18 in Plaintiff's evidence, ECF No. 10, and Defendants' evidence, ECF Nos. 17, 17-1  
19 at 2. The above-cited portions of the record are consistent with each other, such that  
20 the material facts Defendants submitted do not conflict with the material facts  
Plaintiff submitted, and neither party disputes the other party's version of the facts.  
For ease, the Court recites these undisputed facts primarily by referencing the  
complaint, ECF No. 1 at 3–9, and the contract, ECF No. 8-1 at 12, even though  
other portions of the record establish those same facts.

1 Plaintiff elected to have a third party repair the aircraft. *Id.* at 4. Plaintiff solicited  
2 repair cost estimates from three companies. *Id.* Plaintiff selected the median estimate  
3 and notified Defendants of its selection. *Id.* Defendants expressed their refusal to  
4 pay the estimated repair cost. *Id.* Instead, Defendants solicited their own repair cost  
5 estimates. *Id.*

6 The parties dispute the value of the insurance claim. *Id.* at 5. Plaintiff alleges  
7 that “[d]uring the dispute, [Defendants have] attempted to enforce a binding  
8 arbitration provision, in violation of Washington law.” *Id.* That provision reads,

9 **Appraisal**

10 If there is damage or loss to your aircraft and we cannot agree with you  
11 on the amount of the loss, we will use the following procedure to settle  
the disagreement:

- 12 1. Either you or we can request in writing that the dispute be  
13 submitted to arbitration within 60 days of the time we receive  
14 your proof of loss. Each side will then select an appraiser and  
notify the other of that choice within 20 days of the initial  
request for appraisal.
- 15 2. The appraisers will select an impartial umpire who is  
16 experienced in valuing aircraft, their equipment and parts. If  
17 they cannot agree on an umpire within 15 days, either you or we  
can ask that a qualified umpire be appointed by a judge of the  
state or province where the property is located.
- 18 3. The appraisers will assess the loss for each item and submit any  
19 differences to the umpire. Agreement by any two of these three  
will determine the amount of the loss.
- 20 4. You will pay your appraiser and we will pay ours. Each will

1 share equally any other costs of the appraisal and the umpire.

2 ECF No. 8-1 at 12; *accord* ECF No. 10 at 3–4. Elsewhere, the contract provides,  
3 “[y]ou agree not to bring any suit or legal action against us to recover payment  
4 unless you have complied with the terms of this policy.” ECF No. 8-1 at 23.

5 On July 27, 2018, Plaintiff sued Defendants, alleging breach of contract,  
6 insurance bad faith, and violations of the Insurance Fair Conduct Act and Consumer  
7 Protection Act. ECF No. 1 at 6–9.

## 8 **LEGAL STANDARD**

### 9 **A. Federal Rule of Civil Procedure 12(b)(6)**

10 A complaint must contain “a short and plain statement of the claim showing  
11 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6),  
12 the Court must dismiss the complaint if it “fail[s] to state a claim upon which relief  
13 can be granted.”

14 In deciding a Rule 12(b)(6) motion, the Court construes the complaint in the  
15 light most favorable to the plaintiff and draws all reasonable inferences in its favor.  
16 *Ass’n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir.  
17 2011). Thus, the Court must accept as true all factual allegations contained in the  
18 complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But the Court may disregard  
19 legal conclusions couched as factual allegations. *See id.*

20 To survive a Rule 12(b)(6) motion, the complaint must contain “sufficient

1 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
2 face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial  
3 plausibility exists where the complaint pleads facts permitting a reasonable  
4 inference that the defendant is liable to the plaintiff for the misconduct alleged. *Id.*  
5 Plausibility does not require probability but demands more than a mere possibility  
6 of liability. *Id.* While the complaint need not contain detailed factual allegations,  
7 threadbare recitals of a cause of action’s elements, supported only by conclusory  
8 statements, do not suffice. *Id.* Whether the complaint states a facially plausible  
9 claim for relief is a context-specific inquiry requiring the Court to draw from its  
10 judicial experience and common sense. *Id.* at 679.

#### 11 **B. Federal Rule of Civil Procedure 56**

12 Under Rule 56, a party is entitled to summary judgment where the  
13 documentary evidence produced by the parties permits only one conclusion.  
14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is  
15 appropriate if the record establishes “no genuine dispute as to any material fact and  
16 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

17 The moving party has the initial burden of showing no reasonable trier of fact  
18 could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
19 325 (1986). If the moving party meets its burden, the nonmoving party must point  
20 to specific facts establishing a genuine dispute of material fact for trial. *Matsushita*

1 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A genuine  
2 dispute of material fact is “one that affects the outcome of the litigation and requires  
3 a trial to resolve the parties’ differing versions of the truth.” *SEC v. Seaboard Corp.*,  
4 677 F.2d 1301, 1306 (9th Cir. 1982). In deciding a Rule 56 motion, the Court does  
5 not weigh the evidence or assess credibility but, rather, believes the nonmoving  
6 party’s evidence and draws all justifiable inferences in its favor. *Anderson*, 477 U.S.  
7 at 255.

## 8 DISCUSSION

9 **A. The provision at issue here is, under Washington state law, an**  
10 **unenforceable binding arbitration provision.**

11 Under Revised Code of Washington (“RCW”) § 48.18.200, “[n]o insurance  
12 contract delivered or issued for delivery in this state and covering subjects located,  
13 resident, or to be performed in this state, shall contain any condition, stipulation, or  
14 agreement . . . depriving the courts of this state of the jurisdiction of action against  
15 the insurer.” RCW 48.18.200(1)(b). Further, “[a]ny such condition, stipulation, or  
16 agreement in violation of this section shall be void, but such voiding shall not affect  
17 the validity of the other provisions of the contract.” RCW 48.18.200(2).

18 In 1974, the Washington State Court of Appeals, Division I, held “the policy  
19 provision concerning appraisal is not void under [RCW 48.18.200].” *Keesling v. W.*  
20 *Fire Ins. Co. of Fort Scott*, 520 P.2d 622, 625 (Wash. Ct. App. 1974). But in 2013,

1 the Washington State Supreme Court held “RCW 48.18.200 prohibits binding  
2 arbitration agreements in insurance contracts.” *State v. James River Ins. Co.*, 292  
3 P.3d 118, 123 (Wash. 2013). Here, the Court must decide whether the provision at  
4 issue is an enforceable appraisal provision or an unenforceable binding arbitration  
5 provision.

6 In *Keesling*, the insurance contract provided,

7 Appraisal. In case the insured and this Company shall fail to agree as to  
8 the actual cash value or the amount of loss, then, on the written demand  
9 of either, each shall select a competent and disinterested appraiser and  
10 notify the other of the appraiser selected within twenty days of such  
11 demand. The appraisers shall first select a competent and disinterested  
12 umpire; and failing for fifteen days to agree upon such umpire, then, on  
13 request of the insured or this Company, such umpire shall be selected  
14 by a judge of a court of record in the state in which the property covered  
15 is located. The appraisers shall then appraise the loss, stating separately  
16 actual cash value and loss to each item; and, failing to agree, shall submit  
17 their differences, only, to the umpire. An award in writing, so itemized,  
18 of any two when filed with this Company shall determine the amount of  
19 actual cash value and loss. Each appraiser shall be paid by the party  
20 selecting him and the expenses of appraisal and umpire shall be paid by  
the parties equally.

520 P.2d at 623–24.

16 The state intermediate appellate court held this provision was not void under  
17 RCW 48.18.200 because it did not deprive Washington state courts of ‘jurisdiction  
18 of action against the insurer.’ *Id.* at 625. The *Keesling* court reasoned “[a]n appraisal  
19 provision provides a method for establishing the dollar value of damage sustained”  
20 but “the provision is not self-executing.” *Id.* The *Keesling* court then explained, “if

1 the company does not pay the damages fixed by the appraisers, an insured must  
2 commence legal action, the appraisal must be confirmed by the court and judgment  
3 entered for the insured.” *Id.* In the *Keesling* court’s view, this meant “[t]he authority  
4 and control over the ultimate disposition of the subject matter remains with the  
5 courts.” *Id.* Forty-five years later, *Keesling*’s continued validity is dubious.<sup>2</sup>

6 In *James River*, the insurance contract provided,

7 Should we and the insured disagree as to the rights and obligations owed  
8 by us under this policy, including the effect of any applicable statutes or  
9 common law upon the contractual obligations otherwise owed, either  
party may make a written demand that the dispute be subjected to  
binding arbitration.

10 292 P.3d at 120.

11 The state supreme court concluded this provision was void under RCW  
12 48.18.200 because it deprived Washington state courts of ‘jurisdiction of action  
13 against the insurer.’ *Id.* at 121, 123. The *James River* court began by noting it had  
14 previously “recognized a distinction between the court’s jurisdiction in an original  
15 action as compared with the court’s jurisdiction in a special proceeding to confirm  
16 an arbitration award.” *Id.* at 122. In the latter type of case, the *James River* court

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18 <sup>2</sup> “[W]hen, as here, ‘there is relevant precedent from the state’s intermediate  
19 appellate court, the federal court must follow the state’s intermediate appellate court  
20 decision unless the federal court finds convincing evidence that the state’s supreme  
court likely would not follow it.’” *Teleflex Med. Inc. v. Nat’l Union Fire Ins. Co. of  
Pittsburgh*, 851 F.3d 976, 982 (9th Cir. 2017) (quoting *Ryman v. Sears, Roebuck &  
Co.*, 505 F.3d 993, 994 (9th Cir. 2007)).

1 noted “the jurisdiction of the court is limited.” *Id.* The *James River* court then  
2 interpreted RCW 48.18.200 “by looking at the entire phrase ‘jurisdiction of action  
3 against the insurer.’” *Id.* at 123. According to the *James River* court, “this phrase  
4 demonstrates the legislature’s intent to protect the right of policyholders to bring an  
5 original ‘action against the insurer’ in the courts of this state.” *Id.* As the *James River*  
6 court reasoned, “the limited ‘jurisdiction’ provided in [an action reviewing an  
7 arbitration award], would frustrate the legislature’s intent because . . . binding  
8 arbitration agreements deprive our state’s courts of the jurisdiction they would  
9 normally possess in an original action by depriving them of the jurisdiction to review  
10 the *substance* of the dispute between the parties.” *Id.* Thus, the *James River* court  
11 held “RCW 48.18.200 prohibits binding arbitration agreements in insurance  
12 contracts.” *Id.* The Court is bound by *James River*’s holding and reasoning.<sup>3</sup>

13 The appraisal provision involved in *Keesling* is similar to the one here.  
14 Compare 520 P.2d at 623–24, with ECF No. 8-1 at 12. But here, the provision  
15 includes the following additional language that raises the specter of binding  
16 arbitration: “If there is damage or loss to your aircraft and we cannot agree with you  
17 on the amount of the loss, we *will* use the following procedure to *settle* the

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19 <sup>3</sup> “When interpreting state law, federal courts are bound by decisions of the state’s  
20 highest court.” *Teleflex*, 851 F.3d at 982 (quoting *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001)).

1 disagreement: . . . [e]ither you or we can request in writing that the dispute be  
2 submitted to *arbitration* . . . .” ECF No. 8-1 at 12 (emphasis added). Like the  
3 provision involved in *James River*, the above-quoted language deprives  
4 Washington state courts of original jurisdiction over the substance of the parties’  
5 insurance dispute. *See* 292 P.3d at 120, 123. Unlike the provision involved in  
6 *Keesling*, the above-quoted language is self-executing because it establishes a  
7 mandatory settlement procedure that is triggered when a disagreement arises over  
8 the amount of loss, that decisively ends the dispute while foreclosing state courts’  
9 authority and control over its ultimate disposition, and that functions as a  
10 prerequisite to any possible legal action in state courts. *See* 520 P.2d at 625.

11       The provision here is problematic because it requires more than a mere  
12 advisory appraisal process. Indeed, the provision compels a form of binding  
13 arbitration that includes appraisal to guide the mandatory settlement procedure.  
14 Under that procedure, Washington state courts’ involvement is limited to the time  
15 period after an appraisal award has already been made and is limited to deciding  
16 whether the appraisal award should be accepted as conclusive or rejected as the  
17 product of mistake, arbitrary or capricious action, or fraud.<sup>4</sup> In this way, the

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19 <sup>4</sup> *See Lloyd v. Allstate Ins. Co.*, 275 P.3d 323, 328 (Wash. Ct. App. 2012) (“[A]n  
20 appraised award is conclusive as to the amount of loss.”); *Black Mountain Ranch v.*  
*Black Mountain Dev. Co.*, 627 P.2d 1006, 1009 (Wash. Ct. App. 1981) (“The general  
rule is that in the absence of mistake, arbitrary or capricious action or fraud, the

1 provision deprives state courts of original jurisdiction over the substance of the  
2 underlying insurance claim. Considering all, the Court concludes the provision at  
3 issue here is an unenforceable binding arbitration provision.<sup>5</sup>

4 **B. Plaintiff states an adequate claim upon which relief can be granted.**

5 Because the provision at issue here is void and unenforceable under state law,  
6 Plaintiff need not allege it complied with that provision. Therefore, Plaintiff states  
7 an adequate claim upon which relief can be granted.

8 **C. Plaintiff is entitled to summary judgment on its allegation that the**  
9 **provision at issue here is void and unenforceable under Washington state**  
10 **law.**

11 Plaintiff has met its initial burden of showing no reasonable trier of fact could  
12 find in Defendants' favor. But Defendants have failed to identify specific facts  
13 establishing a genuine dispute of material fact for trial. Applying the above-  
14 described law to the undisputed facts, the Court concludes Plaintiff is entitled to

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15 decision by . . . an appraiser is conclusive upon the parties. Only where the appraiser  
16 has proceeded upon a fundamentally wrong basis may the court ignore the  
17 appraiser's findings." (citations omitted)).

18 <sup>5</sup> It is true that this Court previously acknowledged the enforceability of appraisal  
19 provisions. *See Langley v. Geico Gen. Ins. Co.*, No. 1:14-cv-03069-SMJ, 2014 WL  
20 11395159, at \*2 n.3 (E.D. Wash. Dec. 8, 2014) ("Contracts for common-law  
appraisement are enforceable under Washington law." (quoting *Black Mountain*,  
627 P.2d at 1009)). But that statement appears in dicta commenting on the  
prematurity of the plaintiff's challenge to the defendant's anticipated appraisal. *See*  
*id.* And in that case, the parties did not dispute the enforceability of their appraisal  
provision. *See id.* at \*1. Therefore, that case has no bearing on the Court's analysis  
here.

1 judgment as a matter of law on its allegation that the provision at issue here is void  
2 and unenforceable under state law.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 **1.** Defendants' Motion to Dismiss, **ECF No. 8**, is **DENIED**.

5 **2.** Plaintiff's Motion for Partial Summary Judgment, **ECF No. 11**, is  
6 **GRANTED**.

7 **3.** The provision entitled "**Appraisal**" in part 2 of the parties' insurance  
8 contract, **ECF No. 8-1 at 12; ECF No. 10 at 3-4**, is **void and**  
9 **unenforceable** under Washington state law.

10 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
11 provide copies to all counsel.

12 **DATED** this 11<sup>th</sup> day of January 2019.

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14 SALVADOR MENDOZA, JR.  
15 United States District Judge  
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